IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 5424 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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YASINKHAN H PATHAN

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 5424 of 2000

MR MM TIRMIZI for the Petitioner

MR. K.C.SHAH, APP for Respondent No. 1

MR BP DALAL for Respondent No. 2

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 07/08/2002

ORAL JUDGEMENT

In this petition which is filed under Section 482 of the Code of Criminal Procedure, petitioner and two

others against whom Criminal Case No. 1247 of 1993 is filed in the Court of learned JMFC, Modasa for commission of the alleged offence under Section 138 of the Negotiable Instruments Act ('the Act' for short) by the respondent No.2-original complainant, upon which the learned Magisttrate has taken cognizance and issued process, has prayed to quash and set aside the said criminal case filed by respondent No.2 qua him only, on the grounds stated in the petition.

2. It is stated in the petition that petitioner is the original accused No.3 in connection with the offence registered as Criminal Case No. 1247 of 1993 filed in the Court of learned JMFC Modasa for commission of the alleged offence under Section 138 of the Act. It is, inter alia stated in the petition that the petitioner is a practicing Advocate in the Metropolitan Court at Ahmedabad. The original accused No.1, that is, Sugrabibi Mustufamiya Kazi is the second wife of original accused No.2 Mustufamiya whereas the complainant is the first wife of the original accused No.2 Mustufamiya Abdulmiya Kazi. The amount for maintenance is granted by the learned Magistrate against original accused No.2 Mustufamiya A Kazi and in favour of his first wife, i.e., the complainant and, therefore, in recovery application under Section 125(3) of the Code, the order was passed and accused No.2 Mustufamiya was arrested and sent to jail. For payment of amount of Rs.4000/- towards the maintenance, cheque was issued which was signed by the original accused No.1 Sugrabibi M Kazi. The present petitioner, i.e., the original accused No.3, being an advocate was simply present alongwith his client, i.e. accused No.1. Thus, the petitioner has no liability since the petitioner has neither signed the cheque nor there was any legally enforceable debts against him. Therefore, offence as alleged under Section 138 of the Act against him is not made out, and therefore, it is prayed to quash the complaint to which the reference is made earlier.

3. Mr. M.M.Tirmizi, learned advocate for the petitioner contended that since there is no legally enforceable debts against the petitioner and simply he was present when the cheque was presented by accused No.1 to the complainant, no offence as alleged under Section 138 of the Act is made out against the present petitioner and, therefore, the complaint filed against the present petitioner deserves to be quashed. He, therefore, urged to quash the said complaint.

4. Mr. B.P.Dalal, learned advocate for respondent

No.2-original complainant contended that complaint is filed for commission of the alleged offence under Section 138 of the Act as well as under Section 420 of the IPC. He further states that since the trial is awaited, possibility cannot be ruled out that the petitioner can be charged with the offence under Section 420 of the IPC as well. Therefore, it is too premature to say that the offence under Section 420 of the IPC has not been committed by the petitioner. Besides this, it is also asserted by the learned advocate that even offence under Section 138 of the Act is also abated by the petitioner, as at the time of giving cheque by accused No.1 to the complainant he was very much present and he had also stated that the cheque would be encashed, and therfore, he has abated the said offence. According to him, the petitioner has failed to make out a case for quashing of the said complaint. He, therefore, urged to rejecte the petition.

5. Mr. K.C.Shah, learned APP candidly submit that the petitioner cannot be held liable as, he has, neither issued cheque nor there was any legally enforceable debts against him, and the learned Magistrate has also not taken cognizance under Section 420 of the IPC. He, therefore, urged to pass appropriate order of quashing of the complaint qua the petitioner only.

6. Having heard the learned advocates appearing for the parties and on having perusal of the averments made in the memo of the petition, grounds set out therein, and on having perusal of the impugned complaint filed against the petitioner as well as two other by the respondent No.2 -complainant for commission of the alleged offence under Section 138 of the Act, there is no manner of doubt that the present petitioner has neither issued the cheque nor he has signed the cheque. It is admitted position that he is a practicing Advocate who appeared on behalf of the original accused Nos.1 and 2 in a matrimonial proceedings wherein, the order of maintenance was passed against the original accused No.2. Therefore, the original accused No. 1 has issued the cheque in favour of the complainant towards the outstanding amount of maintenance which was awarded in favour of the complainant. Mere presence of the petitioner at the time of giving cheque to the respondent No.2-complainant ipso-facto cannot be constituted as an offence under Section 138 of the Act. It is also admitted position that there was no legally enforceable debts against the petitioner. Therefore, in my view, the complaint being Criminal Case No. 1247 of 1993 filed against the present petitioner as well as two others by the respondent

No.2-original complainant for commission of the alleged offence under Section 138 of the Act deserves to be quashed qua the petitioner only by allowing this petiion.

7. For the foregoing reasons, petition succeeds and accordingly it is allowed. The Criminal Case No. 1247 of 1993 filed by respondent No.2 against the present petitioner as well as two others for commission of the alleged offence under Section 138 of the Act is hereby quashed and set aside qua the petitioner only.

Rule is made absolute to the aforesaid extent.

(A.M.Kapadia,J)

Jayanti*